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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 517

HELEN AUGUSTA VOELKEL,
EDNA ELIZABETH PRATT,

Petitioners,

vs.

GEORGE E. TOHULKA,
CLARENCE A. TOHULKA,
KENNETH D. TOHULKA,
MARGUERITE A. HAY,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of Indiana.

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Petition For Writ Of Certiorari To The Supreme Court Of The State Of Indiana.

Your petitioners, by their counsel, Maurice Tulchinsky, George Sands and Roger F. Gay, respectfully request that a writ of certiorari be issued by this Court to the Supreme Court of the State of Indiana to review the decision of that Court in an appeal, designated in that Court as No. 29530, wherein your petitioners were defendants (appellants) and the respondents were plaintiffs (appellees) for reasons particularly set forth herein.

OPINIONS BELOW.

1. The opinion of the Supreme Court of Indiana, which is attached hereto as Appendix "A", is reported at 141 N.E. (2d), p. 344, being its No. 29530.

2. The opinion of the Indiana Appellate Court is reported at 133 N.E. (2d), p. 871, being its No. 18735, and which opinion appears as Appendix "B" hereto.

3. The opinion of St. Joseph Superior Court No. 1 of St. Joseph County, Indiana, and the decree and judgment of same, which judgment was affirmed by the Supreme Court of Indiana, is attached hereto as Appendix "C".

JURISDICTION.

1. The judgment of the Supreme Court of Indiana affirming the judgment and decree appealed from the St. Joseph County, Indiana, Superior Court No. 1, was entered April 2, 1957.

2. A petition for rehearing was filed in the Supreme Court of Indiana and same was denied May 8, 1957.

3. A petition for extension of time to file this petition for writ of certiorari was filed in this Court and an order entered on August 5, 1957, extending said time to October 1, 1957.

4. Jurisdiction is conferred under Rule 19 (1) (a) of this Court, wherein petitioners claim that the Indiana Supreme Court has decided a Federal question of substance in a way probably not in accord with applicable decisions of this Court, and under U. S. Code, Title 28, Sec. 1257 (3) with reference to titles, rights, privileges and immunities claimed under the Constitution and statutes of the United States.

QUESTIONS SUBMITTED.

1. Whether the National Service Life Insurance Act of 1940, Section 801, 38 U.S.C.A., prevents the imposition of a trust on funds after they are received by a beneficiary.

2. Whether there is such an interest in the proceeds received by a beneficiary under the said National Service Life Insurance Act of 1940 that the same might become the res of a trust.

3. Whether Section 601, National Service Life Insurance Act of 1940, 38 U.S.C.A. Section 801 and 38 U.S.C.A. Section 454a was intended to prevent the raising of a trust on proceeds from National Service Life Insurance.

4. Whether, under Section 616, National Service Life Insurance Act of 1940, 38 U.S.C.A., Section 816, there is a prohibition against a transfer or assignment of the interest of the beneficiary to other persons.

5. Whether, under said National Life Insurance Act of 1940, a trust can be created under principles of equity upon funds received by the beneficiary of such insurance.

6. Whether when the beneficiary of insurance under the National Service Life Insurance Act agreed that if she was named beneficiary she would distribute the proceeds she received, as such, to other brothers and sisters of the insured soldier, such an agreement could be enforced.

7. Whether even though the theory of a complaint filed to enforce the foregoing agreement is not that of a

third party asserting a claim under a contract made for his benefit shall be rather upon the theory that a trust was imposed upon such proceeds when they were received, could recover on the theory of such constructive trust.

8. Whether any statement made by the beneficiary under the National Service Life Insurance Act with reference to the distribution of proceeds received by her, under such Act, from the death of the soldier, that she would distribute such funds equally with other persons, there being no consideration for such an agreement, would be enforcible, or would be (nudum pactum) and could be considered as affirmance of a contract that could not be legally made.

STATUTORY PROVISIONS, RULES AND REGULATIONS.

Rule 19, *Supreme Court of the United States*:

"1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefore. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

"(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

U. S. Code Annotated, Title 28, *Section* 1257:

"Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows: • • • (3) • • • where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

Title 38, *U.S.C.A., Section* 802, (*g*), (*h*), (*i*), (*j*):

The Statute:

Title 38—U.S.C.A., Sec. 802:

"(g) The insurance shall be payable only to a widow, widower, child (including a step-child or an illegitimate child if designated as beneficiary by the insured), parent, brother or sister of the insured. The insured shall have the right to designate the beneficiary or beneficiaries of the insurance, but only within the classes herein provided, and shall, subject to regulations, at all times have the right to change the beneficiary or beneficiaries of such in-

surance without the consent of such beneficiary or beneficiaries but only within the classes herein provided: Provided, That the provisions of this subsection as to the restricted permitted class of beneficiaries shall not apply to any national service life insurance policy maturing on or after August 1, 1946."

"(h) Insurance maturing prior to August 1, 1946, shall be payable in the following manner:

(1) If the beneficiary to whom payment is first made is under thirty years of age at the time of maturity, in two hundred and forty equal monthly installments: Provided, That the administrator under regulations to be promulgated by him, may include a provision in the insurance contract authorizing the insured or the beneficiary to elect in lieu of this mode of payment and prior to the commencement of payments, a refund life income in monthly installments payable for such period certain as may be required in order that the sum of the installments certain, including a last installment of such reduced amount as may be necessary, shall equal the face value of the contract, less any indebtedness, with such payments continuing throughout the lifetime of such beneficiary: Provided further, That in any case in which insurance benefit payments were commenced prior to September 30, 1944, the beneficiary, whether or not the first beneficiary, shall have the right to elect to receive a refund life income, as provided in such optional settlement, payable in monthly installments adjusted as of the date of the maturity of such policy, credit being allowed for payments previously made on the insurance. The right of election with respect to cases in which benefit payments were commenced prior to September 30, 1944, shall terminate two years after August 1, 1946. The Administrator is directed to send, within one year after August 1,

1946, to each beneficiary of insurance on which payments were commenced prior to September 30, 1944, a notice explaining the right of election. Any such notice shall be sent by registered mail addressed to the last known address of the addressee.

(2) If the beneficiary to whom payment is first made is thirty or more years of age at the time of maturity, in equal monthly installments for one hundred and twenty months certain, with such payments continuing during the remaining lifetime of such beneficiary: Provided, That the Administrator, under regulations to be promulgated by him, may include a provision in the insurance contract authorizing the insured or the beneficiary to elect, in lieu of this mode of payment and prior to the commencement of payments, a refund life income in monthly installments payable for such period certain as may be required in order that the sum of the installments certain, including a last installment of such reduced amount as may be necessary, shall equal the face value of the contract, less any indebtedness, with such payments continuing throughout the lifetime of such beneficiary; Provided further, that such optional settlement shall not be available in any case in which such settlement would result in payments of installments over a shorter period than one hundred and twenty months: Provided further, That in any case in which insurance benefit payments were commenced prior to September 30, 1944, the beneficiary, whether or not the first beneficiary, shall have the right to elect to receive a refund life income, as provided in such optional settlement, payable in monthly installments adjusted as of the date of the maturity of such policy, credit being allowed for payments previously made on the insurance. The right of election with respect to cases in which benefit payments were commenced prior to September 30, 1944, shall terminate two years after August 1, 1946. The Administrator is

directed to send, within one year after August 1, 1946, to each beneficiary of insurance on which payments were commenced prior to September 30, 1944, a notice explaining the right of election. Any such notice shall be sent by registered mail addressed to the last known address of the addressee."

"(i) If no beneficiary is designated by the insured or if the designated beneficiary does not survive the insured, the beneficiary shall be determined in accordance with the order specified in subsection (h) (3) of this section and the insurance shall be payable in equal monthly installments in accordance with subsection (h) (1) or (2) of this section, as the case may be. *The right of any beneficiary to payment of any installments shall be conditioned upon his or her being alive to receive such payments. No person shall have a vested right to any installment or installments of any such insurance and any installments not paid to a beneficiary during such beneficiary's lifetime shall be paid to the beneficiary or beneficiaries within the permitted class next entitled to priority, as provided in subsection (h) of this section.* The provisions of this subsection shall not be applicable to insurance maturing on or after August 1, 1946."

"(j) *No installments of such insurance shall be paid to the heirs or legal representatives as such of the insured or of any beneficiary, and in the event that no person within the permitted class survives to receive the insurance or any part thereof no payment of the unpaid installments shall be made,* except that if the reserve of a contract of converted national service life insurance, together with dividends accumulated thereon, less any indebtedness under such contract, exceeds the aggregate amount paid to beneficiaries, the excess shall be paid to the estate of the insured unless the estate of the insured would escheat under the laws of his place of residence, in which event no payment shall be made.

The provisions of this subsection shall not be applicable to insurance maturing on or after August 1, 1946."

Title 38, U.S.C.A., Section 454a:

"Payments of benefits due or to become due shall not be assignable, and such payments made to, or on account of, a beneficiary under any of the laws relating to veterans shall be exempt from taxation, shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary."

Title 38, U.S.C.A., Section 802:

"Optional Modes Of Settlement.

(t) Insurance maturing on or subsequent to August 1, 1946, shall be payable in accordance with the following optional modes of settlement:

(1) In one sum.

(2) In equal monthly installments of from thirty-six to two hundred and forty in number, in multiples of twelve.

(3) In equal monthly installments for one hundred and twenty months certain with such payments continuing during the remaining lifetime of the first beneficiary.

(4) As a refund life income in monthly installments payable for such period certain as may be required in order that the sum of the installments certain, including a last installment of such reduced amount as may be necessary, shall equal the face value of the contract, less any indebtedness, with such payments continuing throughout the lifetime of the first beneficiary; Provided, That such optional settlement shall not be available in any case in which such settlement would result in payments of installments

over a shorter period than one hundred and twenty months.

Unless the insured elects some other mode of settlement, the insurance shall be payable to the designated beneficiary or beneficiaries in thirty-six equal monthly installments. The first beneficiary may elect to receive payment under any option which provides for payment over a longer period of time than the option elected by the insured, in excess of thirty-six months. If the option selected requires payment to any one beneficiary of monthly installments of less than $10.00, the amount payable to such beneficiary shall be paid in such maximum number of monthly installments as are a multiple of twelve as will provide a monthly installment of not less than $10.00. If the present value of the amount payable at the time any person initially becomes entitled to payment thereof is not sufficient to pay at least twelve monthly installments of not less than $10.00 each, such amount shall be payable in one sum. Options (3) and (4) shall not be available if any firm, corporation, legal entity (including the estate of the insured), or trustee is beneficiary, or in any case in which an endowment contract matures by reason of the completion of the endowment period."

Title 38, U.S.C.A., Section 816:

"The provisions of Sections 101-104, 131-134, 450, 454a and 556a of this Title, insofar as they are applicable, shall apply to the provisions of this subchapter: Provided, that assignments of all or any part of the beneficiary's interest may be made by a designated beneficiary to a widow, widower, child, father, mother, grandfather, grandmother, brother, or sister

of the insured, when the designated contingent beneficiary, if any, joins the beneficiary in the assignment. * * *"

Title 38, *U.S.C.A., Section* 808:

"The administrator, subject to the general direction of the president * * * shall have power to make such rules and regulations not inconsistent with the provisions of this sub-chapter as are necessary or appropriate to carry out its purposes. * * *"

Regulation 10.3446 *of Administrator of National Service Life Insurance Act*:

"An original beneficiary designation may be made by last will and testament duly probated, but no change of beneficiary may be made by last will and testament."

Regulation 10.3447—*Beneficiary Changes*:

"The assured shall have the right at any time from time to time, without the knowledge or consent of the beneficiaries, to cancel the beneficiary designation or to change the beneficiary * * *"

"A change of beneficiary to be effective must be made by notice in writing, signed by the insured * * * containing sufficient information to identify the insured."

Section 2-2401 *Burns Indiana Statutes*:

"A new trial may be granted in the following cases: * * * (6th) that the verdict or decision is not sustained by sufficient evidence, or is contrary to law."

Rule 2-23, *Indiana Supreme and Appellate Courts*:

"A petition to transfer a cause from the Appellate Court to the Supreme Court * * * shall state briefly: (b) That the opinion of the Appellate Court erroneously decides a new question of law, concisely stating the same.

STATEMENT.

The petitioners and respondents are brothers and sisters of a soldier in the United States Army who was killed in action April 22, 1945, and at the time of his death held insurance under the National Service Life Insurance Act of 1940 in the sum of Ten Thousand Dollars ($10,000.00), under which policy the petitioner Helen Voelkel was designated as beneficiary and the petitioner Edna Pratt was designated as contingent beneficiary. Following his death the petitioner Voelkel has received payments from the United States Government under such policy and is now receiving same. She was a sister of the deceased soldier.

The respondents are other brothers and sisters of said soldier and they filed this action in the trial court, maintaining that she is required to account to them for their respective portions of the insurance proceeds heretofore received by her and hereafter to be received, based on the following facts:

1. That while said soldier was on a furlough and at a time when he had One Thousand Five Hundred Dollars ($1,500.00) of insurance under said law, he met his sister, the petitioner Helen Voelkel, at an attorney's office to draw a will and to arrange for the distribution of proceeds of life insurance, at which meeting said Helen Voelkel agreed, in the event of his death, to divide his property, including life insurance if she were designated as beneficiary, between petitioners and respondents. At that time the respondent George Tohulka, a brother of the soldier, was the beneficiary designated in his life insurance. At the same occasion he executed a will, containing the following provisions:

"All my insurance, meaning the proceeds of any policies upon my life, and including United States Government insurance, shall be paid to those entitled to my residuary estate under this item of my Will, all provisions in beneficiary clauses to said policy or policies to the contrary, notwithstanding."

2. Later, he obtained an additional Eight Thousand Five Hundred Dollars ($8,500.00) of insurance and designated the petitioner Helen Voelkel as sole beneficiary of the whole of such insurance in the sum of Ten Thousand Dollars ($10,000.00).

3. Following his death and the receipt by the petitioner Voelkel of the proceeds of such policy, action was instituted by these respondents in the District Court of the Northern District of Indiana against the United States Government for a reformation of the certificate of insurance to include these respondents as beneficiaries and to direct the petitioner Voelkel and her co-petitioner to account to these respondents for all insurance proceeds. And the United States District Court held that there was no jurisdiction to decide the controversy due to the fact that there was no diversity of citizenship between the parties. This action was appealed to the Circuit Court of Appeals of the Seventh Circuit, which sustained the decision of the District Court in *Tohulka* v. *United States*, 204 F. (2d) 414, the court stating, at page 15 of the opinion, as follows:

"In other words, they do not contend that the designation of the two sisters, Helen Augusta and Edna E. as beneficiaries is invalid or has been changed, but seek to have the funds already received by Helen and those hereafter to be paid to her by the Government as designated beneficiary be declared trust funds."

and it further held, at page 415 of the opinion, as follows:

> "Here it is clear that there is no dispute as to the government's liability to pay to the designated beneficiary and no dispute as who is in fact the beneficiary. The whole controversy is one between private parties concerning transactions between themselves."

4. The complaint filed in the trial court was based on the theory of establishing such trust fund. And the trial court sustained such theory, which was sustained by the Supreme Court of Indiana after having been reversed by the Appellate Court of said State.

5. With reference to the alleged agreement between Helen Voelkel and her deceased brother, the Supreme Court of Indiana expressly held that its decision was not based on a contract made for the benefit of third persons but that these respondents, who were plaintiffs in the Cause in the trial court, were bound by their theory that they could only recover against the petitioner Voelkel in equity on the theory of a trust, the language being as follows: (141 N.E. (2d) 348)

> "The appellees' complaint in this case is based entirely upon the equitable theory of a trust and not upon contract. Therefore, the contract for the benefit of a third party is of no benefit to appellees under their action as pleaded. Appellees are bound by the theory of their complaint. They cannot sue in equity asking that appellant, Helen Voelkel, be declared a trustee, and recover damages on contract for a breach of same."

The Supreme Court of Indiana held that the arrangement between the soldier and his sister was in the nature of a constructive trust (p. 349 of the opinion).

6. The additional evidence relied upon in the Supreme Court of Indiana to support such alleged "constructive

trust" is that the petitioner Voelkel, when asked by the respondent George Tohulka about dividing the insurance money, made this statement: "Why, certainly. What kind of a sister do you think I am?" Later, she said she would divide the money as soon as her brother's body was brought back from Germany and the expenses paid. As some of the money was received she deposited it in the account of the brother's estate and later withdrew it and put it in her private bank account.

7. With respect to any arrangement between the soldier and the petitioner sister with reference to division of the proceeds of his insurance, it is respectfully contended that the same is contrary to the clear provisions of the National Service Insurance Law and with respect to any statements made by the petitioner Voelkel following the death of her soldier brother, it is contended that they could not constitute a trust contract in any respect as the brother was dead and the rights of the parties were fully determined upon his death, and there was no consideration for any promises so made by her.

8. There is not a scintilla of evidence in the record that from the time decedent increased the insurance and changed the beneficiary to appellant Voelkel as principal beneficiary and appellant Pratt as contingent beneficiary he ever indicated to her or any one else that he desired or wanted her to divide the proceeds of this insurance.

How Federal Questions Were Raised.

The respondents filed their complaint in the trial court, being St. Joseph Superior Court No. 2 of St. Joseph County, Indiana, asking that these petitioners be declared a trustee as to funds received by her, and hereafter received, under the National Service Life Insurance Act, and

that she be required to account for same to the respondents in this cause (R. 1-15). To this complaint these petitioners filed a motion to make specific to designate the exact date of the instrument, being the last will and testament of a deceased soldier killed in action, whereunder contention was made that petitioners were required to make such an accounting (R. 16-17). Respondents filed a petition for receiver to impound and receive the monies due under said policy of insurance (R. 18-23), to which petitioners filed their answer setting forth that under federal law funds collected or to be collected under a National Service Life Insurance policy were not subject to such accounting (R. 25-34). These petitioners, as defendants in the trial court, then filed their demurrer to the complaint alleging that under the National Service Life Insurance Act of 1940, the plaintiffs in said action in the lower court were not entitled to relief (R. 35-40), which said demurrer was overruled by the court (R. 41). That these petitioners, as defendants in the cause before said lower court, thereupon filed their answer to the complaint setting out the facts that the monies in question had been received under the National Service Life Insurance Act of 1940 (R. 43-46) and, at the same time, filed their demurrer to certain paragraphs of the complaint based on the same grounds as the first demurrer, that funds received under the insurance were not accountable to other persons than the beneficiary under the terms of the National Service Life Insurance law (R. 46-58), which said pleading is stated as follows:

> "The alleged agreement and promise averred in said paragraph of complaint for the payment of such proceeds to a trustee, to be by such trustee distributed in the manner claimed, being repugnant to and in conflict with said federal law, is utterly void

and unenforceable, and hence the facts averred in such paragraph are not sufficient to constitute a cause of action."

A motion was filed to strike the second demurrer, which was overruled (R. 59), and, on consideration of the demurrer itself, the same was overruled (R. 59).

Petitioners, who were defendants in the trial court, then filed their answer setting up the same federal questions (R. 60-70).

These petitioners, as defendants in the trial court, thereupon propounded interrogatories to be answered by plaintiffs (R. 70-73), questioning whether the proceeds for which a trustee and an accounting was demanded in the complaint, were received under a National Reserve Life Insurance policy, to-wit, No. 68597 (R. 70-73), to which answers were filed that such funds in question were so received (R. 73-75).

Petitioners, as defendants in said cause, requested special findings of fact and conclusions of law to be rendered by the trial court (R. 75).

Following the decree of the trial court (R. 77-82) to the effec that petitioner should be required to account in specified amounts to the respondents and that as accruals under such policy were collected by her she should further account to said respondents in certain sums (R. 81) based on the fact that she was declared to be a trustee of funds collected under insurance policies N68597 and N8827204 (R. 82).

Petitioners filed their motion for a new trial on the following grounds:

"1. That the decision of the court is not sustained by sufficient evidence.

"2. That the decision of the court is contrary to law."

(R. 83), which said motion was overruled by the court (R. 83). This motion for a new trial was filed pursuant to Section 2-2401 Burns Indiana Statutes.

A bill of exceptions was prepared covering the evidence in this cause and the transcript was filed in the Appellate Court of Indiana (R. 310) together with the following assignment of errors (R. 1-A) which states as follows:

"That the court erred in overruling appellants' motion for a new trial."

On appeal to the Appellate Court of Indiana, the judgment and decree of the trial court was reversed (Appendix "B").

Under Rule 2-23 of the Supreme and Appellate Courts of Indiana the cause was transferred to the Supreme Court of Indiana on the ground that the opinion of the Appellate Court erroneously decided a new question of law and by the opinion of the Indiana Supreme Court (Appendix "A") the judgment of the trial court was affirmed. In both the opinions of the Appellate and Supreme Courts of Indiana the federal question with reference to insurance under the National Service Life Insurance Act were raised, discussed and decided in a contrary manner.

ARGUMENT.

To hold that a valid oral trust may be impressed upon insurance proceeds under the National Insurance Life Insurance Law is violative of the contract between the soldier and the United States Government. There is no formal policy issued, but the Act and the Regulations constitute the contract of insurance. In designating the beneficiary, the soldier determines that such beneficiary shall have the enjoyment of the proceeds. To permit oral testimony for the purpose of establishing that the beneficiary is a trustee for other persons is to hold that such other persons are the real beneficiaries. This cannot be assumed to be what the soldier intended, and the law unquestionably contemplates that the named beneficiary shall benefit, and that the question shall not be thrown open to the vagaries of parol evidence. Most states provide that trusts in real estate can be created only in writing and it is our contention that the National Service Life Insurance Law makes such a restriction.

Regulation, Section 10.3447 of the Administrator provides:

> "A change of beneficiary, to be effective, must be made in writing signed by the assured."

Section 808, Title 38, U.S.C.A., gives this power to the administrator, and such a regulation has the force and effect of law, and is a provision of the insurance contract.

Jones v. *U. S.* (Ark., 1951)
189 F. (2d) 601,

U. S. v. *Jones* (D. C. West Va., 1951)
101 F. Supp. 128.

No affirmative act or writing on the part of the veteran is shown in this case, but parol testimony of other persons is relied upon to take the place of the "veteran's hand."

The courts have held that such writing need be in no particular form nor meet any technical requirements, but must be in the hand of the insured.

> "The minimum, however, has been held to require proof of some affirmative act in the form of a writing, even though meager, as long as it was by the hand of the insured."
>
> *Blanchard* v. *U. S.* (1950)
> 91 F. Supp. 889,
> *Bradley* v. *U. S.* (1944)
> 143 F. (2d) 573,
> *Cohn, et al* v. *Cohn, et al* (1948)
> 171 F. (2d) 828,
> (Certiorari denied 336 U. S. 692).

It is again provided under Regulation Section 10.3446 that:

> "No change of beneficiary may be made by last will and testament."

This decision amounts to changing a beneficiary in a manner other than the law and regulations provide and is an attempt to do by indirection what could not be done directly.

The decision, in effect, permits assignment of these funds contrary to the provisions of the Insurance Law, which prohibited same.

Title 38, U.S.C.A., Sec. 454a.

This is contrary to the holding of this court in *United States* v. *Henning* (1952), 344 U. S. 66, 73; 73 S. C. 114, 97 Law Ed. 101.

In that case beneficiaries died before receipt of matured payments. Judgment that certain matured payments be awarded estate of one deceased beneficiary and one-half of certain matured payments to estate of another deceased beneficiary. Justice Clark states:

> "The asserted distinction assumes that when Congress * * * conditioned payment to beneficiaries on their 'being alive' to receive such payments, it meant nothing else; that it exempted without words or other indication installments accrued but not yet paid. We cannot so nullify the clear import of Sub-section (i). The 1917 War Risk Insurance Act was well understood to prohibit payment of the accrued installments to estate of beneficiaries who did not live to take their intended shares. The very contention here made today was then examined and rejected.
>
> "The conclusion is irresistible that when in 1940 the law conditioned payments on the beneficiaries being alive to receive them, Congress said what it meant and meant what it said."

This decision is also contrary to Section 454a, Title 38, U.S.C.A. in permitting a "seizure" of funds as received by the beneficiary; and in this connection is contrary to the decision of this court in *Wissner* v. *Wissner* (1950) 338 U. S. 655, 70 U. S. Supreme Court Reporter 398, 94 Law Edition 424, which was a controversy between mother and widow claiming one-half of the proceeds of National Service Life Insurance under community property law of California. Judgment for one-half in favor of mother, and decree for the payment likewise of one-half of future payments to wife. The court said:

"Judgment under review has a further deficiency so far as it ordered the division of future payments as soon as—paid by government to mother. The very payments received—are to be 'seized' in effect by the judgment below. This is in flat contradiction with the exempt provision contained in 38 U.S.C.A., 454a (supra) payments to the named beneficiary shall be exempt from * * * levy or seizure by or under any legal or equitable process whatever, either before or after receipt.

"* * * the statute which made insurance proceeds possible was explicit—the insured shall have the right to designate the beneficiary—'no person shall have a vested right' to those proceeds, 38 U.S.C.A., Sec. 802 (i) (supra) 'appellee could not in law contemplate their capture.'"

Petitioners contend that there is no title created in proceeds of National Service Life Insurance policy and hence could not become the res of a trust.

"Policies of National Service Life Insurance are, of course, contracts of the United States and possess the same legal incidents as other government contracts * * * The validity and construction of such policies present questions of Federal law."

Woodward v. *United States* (1948),
167 Fed. (2) 774.

"Question—Did Congress, in enacting the National Service Life Insurance Act of 1940, intend the Act to exclusively occupy the filed and, therefore, intend it to be supreme, state laws to the contrary notwithstanding? This question must be answered in the affirmative."

Carballo v. *McFann* (1950)
224 Pac. (2) 902.

It is provided under the law that "no person shall have a vested right to any installment or installments of any such insurance."

Title 38, U.S.C.A., Sec. 802 (i)

If we are to avoid this rule as to assignments, by adopting the theory of an oral trust, then it is conceivable that any person who could benefit from trusts—including strangers to the veteran—could benefit in the end from such policy, which is clearly contrary to the spirit and terms of the Act, to limit its benefits to a permitted class. It is begging the question that these respondents are within such class, to apply a trust theory could easily result, in other cases, in destroying the intent of the law, which was to limit the benefits to a certain class.

Thus it is provided under Title 38, U.S.C.A., Section 802 (g) who may be designated beneficiary; and under Section 802 (h) (3) that upon the death of the beneficiary the remainder of installments would go to the "person or persons" within the classes.

In the case at bar, in the event of the death of one of the respondents, that share would go to the estate and heirs of the decedent respondent contrary to the sections of the law above cited, and to Section 802 (j) which provides:

> "No installments of such insurance shall be paid to the heirs or legal representatives of the insured, or of any beneficiary."

CONCLUSION.

It would appear that this decision is contrary to the National Life Insurance Law, to the regulations under it, and to the previous opinions of this Court in construing such regulations and law. We respectfully petition

for this writ of certiorari for the reasons, believing that both veterans and the United States Government have an interest in a correct interpretation of these questions.

HELEN AUGUSTA VOELKEL,
EDNA ELIZABETH PRATT,

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Attorneys for Petitioners.

APPENDIX.

APPENDIX "A".

IN THE SUPREME COURT OF INDIANA

Helen Augusta Voelkel,
Edna Elizabeth Pratt,
Appellants

v.

George E. Tohulka,
Clarence A. Tohulka,
Kenneth D. Tohulka,
Marguerite A. Hay,
Appellees

No. 29,530

(Filed Apr. 2, 1957)

Mabel E. Lyons, Clerk.

Present:

Maurice M. Tulchinsky
George Sands
South Bend, Indiana
Attorneys for Appellants

Louis M. Hammerschmidt
South Bend, Indiana

Hammerschmidt & Johnson
South Bend, Indiana
Of Counsel
Attorneys for Appellees.

Appeal from St. Joseph Superior Court No. One

Hon. E. Spencer Walton, Judge.

(Appendix)

Transferred from Appellate Court under §4-215, Burns' 1946 Replacement.(1)

ARTERBURN, Judge.

This case is here on transfer from the Appellate Court It is a case in which a soldier, on furlough, met his sister, Helen Augusta Voelkel, hereafter referred to as appellant, and a brother, Randall, in an attorney's office to make a will, and to arrange for the disposition and distribution of the proceeds of his life insurance contract under the National Service Life Insurance Act of 1940, 38 U.S.C.A. §801. At the time he had already taken out insurance in the amount of $1500. He stated at the meeting that in event of his death he wanted his property, including his insurance, to be divided equally among his sisters and brothers (except Randall). He further asked the appellant if she were designated as beneficiary of his insurance if she would accordingly distribute it. To this she agreed. At the time a brother, George, was designated as beneficiary of the insurance. The will was made and contained the following statement:

> "All my insurance, meaning the proceeds of any policies upon my life, and including United States Government insurance, shall be paid to those entitled to my residuary estate under this item of my Will, all provisions in beneficiary clauses to said policy or policies to the contrary, notwithstanding."

Later, the soldier brother secured $8500 more such insurance, making a total of $10,000 on his life, and had his sister, the appellant, named sole beneficiary of all the

(1) See: Voelkel v. Tohulka (1956), 133 N.E. 2d 871 for Appellate Court opinion.

insurance. He was killed in action at Desau, Germany, on April 22, 1945. Settlement of the insurance proceeds was made with the appellant who refuses to make a distribution among her brothers and sisters. The appellees filed suit charging appellant as trustee of the insurance proceeds. She opposes this contention, and also claims the National Service Life Insurance Act of 1940, 38 U.S.C.A. §801, *supra*, prohibits the creation of a trust of such insurance funds.

There is very little authority to aid us in the consideration of any limitations upon the imposition of a trust on insurance proceeds payable under the National Service Life Insurance Act of 1940, 38 U.S.C.A. §801, *supra*.

Appellant relies to a large extent upon §454(a) of the Title:

> "Payments of benefits due or to become due shall not be assignable, and such payments made to, or on account of, a beneficiary under any of the laws relating to veterans shall be exempt from taxation, shall be exempt from the claims of creditors, and shall not be liable to attachment, levy or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary."

It is plain the object of this section is to protect the beneficiaries who are, by the act, close relatives and dependents of the deceased soldier from their own improvidence. This is in effect what is commonly known as a "spendthrift" clause. Clearly the purpose of §454(a), *supra*, is to prevent creditors from taking the proceeds of the soldier's insurance from his beneficiaries. We feel it should be interpreted in that light. The words "equitable process whatever" is limited to those processes brought

by creditors. We see nothing in this section which indicates that Congress desired to prevent the raising of a trust where it is done to carry out the deceased soldier's intent.

In *Burgess* v. *Murray* (1952), 194 F. 2d 131, the insured soldier named his father as principal beneficiary of his National Service Life Insurance policy and his sister as contingent beneficiary. On November 23, 1943, the insured wrote his father stating he wanted the insurance used for the benefit of his children. The insured died on January 12, 1945. The Federal District Court held a trust was created for the benefit of the children. The United States Circuit Court of Appeals for the Fifth Circuit affirmed this judgment.

In *Kaschefsky* v. *Kaschefsky* (1940), 110 F. 2d 836, the insured soldier wrote a letter to his mother stating he desired all his insurance divided equally among his brothers and sisters. He said he had been told he could name only one beneficiary in the policy, and was naming only one of the brothers who was to divide it accordingly. The court quotes with approval from *Claffy* v. *Forbes*, D.C. Wash., 280 Fed. 233, 235, the following statement:

> "Form, formality, and legal technicality must give way to common sense and remedial justice, when all doubt is removed as to the intent of the deceased soldier; and when the purpose of the law has been complied with, there should be no hesitancy in carrying out the express wish of such deceased. The letter is a designation signed by the insured and the fact that it was sent to the mother to make the final designation, in the event of her death, instead of being sent to the bureau for record, should not defeat it."

That court had no difficulty with the Federal act in holding the named beneficiary a *trustee* of the proceeds of the insurance to be divided among all the brothers and sisters.

Appellant relies upon *Wissner* v. *Wissner* (1950), 338 U.S. 655, 70 S. Ct. 398, 94 L. Ed. 424, as supporting her position. An examination of that case shows that the deceased soldier intended for his mother, and not his estranged wife, to have the proceeds, and so designated his mother. The wife's claim was somewhat in the nature of that of a creditor. It was based upon the theory that she contributed one-half the premiums under the community property law of California, and that as a result, she was entitled to one-half of the proceeds. The court on appeal disallowed such a claim.

We feel we are bound by the interpretation and operation the Federal courts have given this legislation.

American Law of Veterans, 2nd Ed., §491, p. 351, says:

> "As to policies maturing on or after August 1, 1946, the insured has a right to designate a beneficiary as trustee for another. As to policies maturing prior to August 1, 1946, the statute is silent with respect to the right of an insured to ingraft a trust upon the insurance proceeds. In the face of similar omission in the War Risk Insurance Act the courts held that a trust created by an insured would be enforced."

There is no prohibition against a transfer or assignment of a beneficiary's interest in such insurance to another person within the permitted class of beneficiaries such as brothers and sisters, as here.

38 U.S.C.A. §816.

After a beneficiary once acquires title to the payments she may do as she pleases with the proceeds so far as the Government is concerned. It no longer places any restraint upon the disposition.

There appears no impediment in the National Service Life Insurance Act of 1940, 38 U.S.C.A. §801, *supra*, directly opposing the imposition of a trust on funds after they are received by a beneficiary in the interest of a proper disposition of the proceeds in conformity with the wishes of a deceased soldier, if the facts exist which, under other principles of equity, would raise a trust.

French v. *French* (1946), 161 Kan. 327, 167 P. 2d 305, (Cert. Denied, 329 U.S. 727, 67 S. Ct. 81, 91 L. Ed. 629);

Shelly v. *McKimmons* (1939), 32 Cal. App. 2d 711, 90 P. 2d 842, (Cert. Denied, *Davis* v. *Shelly*, 308 U.S. 610, 60 S. Ct. 174, 84 L. Ed. 510);

Claffy v. *Forbes, supra,* (1922), 280 Fed. 233;

Christensen v. *Christensen* (1926), 14 F. 2d 475;

Ambrose et al. v. *United States* (1926), 15 F. 2d 52.

We come now to a consideration of the final question in this case. Do facts exist here sufficient for the trial court to impress a trust upon the proceeds of the insurance received by the appellant for the benefit of herself and her brothers and sisters equally (except Randall)?

We agree with appellant that no trust was created at the meeting in the attorney's office when the understanding and agreement was made between appellant, Helen Voelkel, and her soldier brother, for the division of the proceeds of the insurance money. She possessed no trust

property or *res* at the time, and was not then the named beneficiary in any of his insurance contracts. One who has a mere expectancy in property with no present interest cannot create a present trust thereof.

Restatement, Trusts, §86, p. 243;

Restatement, Trusts, §26f, p. 83;

1 Scott, Trusts, §86, p. 648.

The facts do support the consummation of a valid contract at the time between the appellant and her brother, to divide the proceeds as he requested. The contract was one for the benefit of third parties, the other brothers and sisters, as well as the appellant, and was supported by a consideration—the share of the proceeds she was to receive.

Bogert says:

> "A trust may fail as a present trust because the trust property sought to be made the basis of it is a nonexistent interest on account of nonexistence of the thing to which the interest is to attach.
>
> "Obviously there may be a *contract* to settle in trust an interest in a nonexistent thing at a future date when the thing comes into being. The enforcibility of such a contract will depend on principles of the law of contracts."

1 Bogert, Trusts and Trustees, §112, p. 507.

Some courts have given third party beneficiaries to a contract a remedy under certain equitable principles sometimes stated to be that of a trust. This is true, particularly in England and some jurisdictions in this country, where third parties, not being privy to the contract, are not permitted to sue on contract at law. This is a remedy forced by reason of the refusal of such courts to recognize

a remedy for breach of such contract for the benefit of third parties.

1 Scott, Trusts, §14.3, p. 143;

2 Williston, Contracts, §360, p. 1053;

4 Corbin, Contracts, §782, p. 78;

1A Bogert, Trusts and Trustees, §203, p. 265.

In a majority of jurisdictions, including Indiana, however, we do not confuse such situations with trusts but instead permit suits to be brought directly by third party beneficiaries on such contracts made for their benefit.

Restatement, Contracts, §135a, p. 158, and Indiana Annotations thereto, Pocket Supp. p. 47;

Freigy v. *Gargaro Company, Inc.* (1945), 233 Ind. 342, 60 N.E. 2d 288;

Hess v. *Lackey* (1921), 191 Ind. 107, 132 N.E. 257;

Copeland, Executor, et al. v. *Summers et al.* (1894), 138 Ind. 219, 35 N.E. 514, 37 N.E. 971;

Stevens v. *Flannagan et al.* (1892), 131 Ind. 122, 30 N.E. 898.

However, a valid contract to create a trust should be distinguished from a presently created trust in fact. One is a promise, the other an existing fact.

1 Scott, Trusts, §30, p. 226;

1 Bogert, Trust and Trustees, §112, p. 507;

Restatement, Trusts, §75, p. 225;

Restatement, Trusts, §86b, p. 245;

54 Am. Jur., Trusts, §41, p. 51.

The appellees' complaint in this case is based entirely upon the equitable theory of a trust, and not upon con-

tract. Therefore, the contract for the benefit of a third party is of no benefit to appellees under their action as pleaded. Appelles are bound by the theory of their complaint. They cannot sue in equity asking that appellant, Helen Voelkel, be declared a trustee, and recover damages on contract for a breach of same.

Legrande v. *Legrande*, 178 S.C. 230, 182 S.E. 432, 102 A.L.R. 588.

If the appellees are to prevail in this appeal it must be solely upon the theory that equity raises a trust upon the facts of this case. The evidence shows that the appellant's mere expectancy of becoming a named beneficiary of the insurance policy became a reality by the vesting of the interest, when her soldier brother named her as a beneficiary of the $10,000 of government insurance, and upon his death she received the proceeds in accordance with the promise she had made to him. The question then arises: Even though there is a mere promise to create a trust in property not then in existence, if thereafter such property or proceeds comes into existence, and vests in the one who made the promise to act as trustee, does equity impose a trust obligation upon such a person? We believe there are two reasons for answering that question in the affirmative in this case: (1) This situation is analogous to that of a proposed legatee who orally has promised a testator to distribute a legacy as a trust among certain beneficiaries, and then refuses to do so after receiving the property. Restatement, Trusts, §55a, p. 160, states a constructive trust "arises out of the breach of an intended expressed trust which is unenforceable because of the failure to comply with the requirements of the Statute of Wills." A similar situation arises where a man's heir

or next of kin induces him not to make a will by a promise to hold the property in trust for a third person.

Among law writers there has been a great deal of controversy as to whether the constructive trust should be for the benefit of the intended beneficiary, and thus in effect carrying out a testamentary disposition without conforming to the Statute of Wills, or for the benefit of the heirs or estate of the testator, and thus merely restore the status quo.

1 Scott, Trusts, §55.1, p. 397;
3 Bogert, Trusts and Trustees, §501, p. 252;
Costigan, 28 Harvard Law Review (1915), p. 237;
Ames, Lectures on Legal History (1913), p. 430;
1 Restatement, Trusts, §55, p. 160.

Here we are not concerned with that problem. Neither the Statute of Wills nor the Statute of Frauds is involved. We have merely a promise made at the time when the proposed trust *res* was an expectancy, which later vested. To raise a constructive trust in this case will not violate or run counter to either the Statute of Wills or Statute of Frauds. Normally, courts experience no difficulty in imposing a trust where there is fraud, deceit, or a confidential relationship existing, upon which the party furnishing the trust *res* has relied. When these factors are not very evident most courts, nevertheless, will pay lip service to these notions, and extend themselves in attempts to invision their existence before imposing a constructive trust for breach of such a promise.

"The American cases show clearly that the courts regard the trust for C as constructive and as based upon the ground that B's conduct in seeking to re-

tain the property for himself, after having obtained it from A on the faith of his promise to hold it for C, is highly reprehensible, and unconscionable, or, as many courts say, is 'fraudulent'."

3 Bogert, Trusts and Trustees, §499, p. 233.

"Suppose, however, that B was not guilty of fraud or duress or undue influence, but has simply failed to perform his promise to hold for C or to convey to C? Even in such a case, by the weight of authority, C is entitled to recover the property, not only in the case of personal property, but also in the case of land."

1 Scott, Trusts, §55.1, p. 392.

Although it may be difficult to justify a constructive trust in all cases on the basis of fraud, still, if there is a breach of confidence coupled with an unjust enrichment which shocks the conscience if it is permitted to stand, it is then said to be a "constructive" fraud. To hold otherwise, it is said, is rewarding bad faith.

1 Scott, Trusts, §55.1, p. 397;

54 Am. Jur., §231, p. 177;

37 Harvard Law Review, p. 653;

Restatement, Restitution, §160, p. 640.

These cases, which are inaptly called "secret" trusts, have the same characteristics as the insurance cases such as we have here. In the beginning a mere expectancy is involved until the person is named beneficiary in the policy.

Restatement, Trusts, §84b, p. 241;

Restatement, Trusts, §57f, p. 178.

Both situations are the result of a breach of confidence and cause an unjust enrichment upon the death of the one furnishing the trust property, and the retention of the property by the promisor. We have been unable to find any cases involving reliance upon oral promises of a proposed beneficiary in an insurance policy to hold the proceeds in trust, where at the time the promise was made, the promisor was not then the beneficiary named in the policy. However, by strict analogy, we see no reason why the same principles of equity should not apply as that imposed in the case of a prospective legatee, or heir, who makes such a promise.

We need not base our decision upon the above analogy alone, but there is still another cogent reason why appellant must fail here.

(2) If there was any reaffirmance of the original promise by appellant after the interest became vested in her such as to constitute a second declaration of a trust, then she would be held by such operative facts in equity as a trustee.

Restatement, Trusts, §86c, p. 246, says:

> "If a person promises to declare himself trustee of property which he hopes to acquire in the future or to transfer such property to another in trust, or if he purports to declare himself presently trustee of such property or to transfer such property to another in trust, no trust arises even when he acquires the property *in the absence of a manifestation of intentions at the time.*" (Our italics).

Scott says:

> "Where a person promises, not that he will transfer property in trust, but that he will himself be

trustee of the property at sometime in the future, a trust does not automatically arise when that time arrives. It will arise at that time, however, if the settlor then manifests an intention to be trustee. His subsequent conduct, taken into consideration with his prior promise, may amount to a present declaration of trust."

1 Scott, Trusts, §26.5, p. 213.

The facts here show that appellant did reaffirm her original promise after she acquired an interest in the proceeds of the insurance. It seems she not only reaffirmed her promise to make the distribution, but to some extent acted upon it, and entered upon the performance of the task of distribution.

The evidence is undisputed that shortly after the insured's death, when asked by her brother George about dividing the insurance money, she said: "Why certainly, what kind of a sister do you think I am." Later, when asked when she was going to divide the money, she told them that it would be done as soon as her brother's body was brought back from Germany, and the expenses paid. As some of the money was received, she deposited it in the account of his estate, which was to be distributed among the brothers and sisters, except Randall. Later, she withdrew this, and put it in her private bank account. This seems to have occurred about the time of the making of a final accounting in the estate, and after an attorney had informed her she did not have to make any distribution of the insurance money to her brothers and sisters. The evidence is undisputed that appellant, after her right to the insurance proceeds became vested, declared not only by her statements, but also her acts that she was holding the proceeds of her brother's insurance for the benefit of

her brothers and sisters and herself as originally agreed, thus giving a "manifestation of her intentions at the time" to act as trustee. An orally expressed trust may be created in personal property held and owned by a person, at any time by the mere declaration that it is so held. No formal words are necessary if the intentions as well as the terms, are plain.

Hinds v. *McNair* (1955), 235 Ind. 34, 129 N.E. 2d 553;

1 Bogert, Trusts and Trustees, §65, p. 398.

1 Restatement, Trusts, §39, p. 124.

The finding and judgment of the trial court is supported by the evidence.

Judgment is affirmed.

ACHOR, C. J. and EMMERT, J. concur.

BOBBITT and LANDIS, JJ. concur in result.

(Appendix)

The State of Indiana,

In the Appellate Court, In Banc

On the 1st day of May, 1956, being the 134th Judicial day of said

Hon. Wilbur A. Royse, Chief Judge
Associate Judges
Hon. John W. Pfaff, P. J.
Hon. Harry L. Crumpacker
Hon. Donald E. Bowen
Hon. Dewey Kelley
Hon. John A. Kendall

In the Case of
Helen Augusta Voelkel,
Edna Elizabeth Pratt,
Appellants,
vs.
George E. Tohulka,
Clarence A. Tohulka,
Kenneth D. Tohulka,
Marguerite A. Hay,
Appellees.

Appealed from the St. Joseph Superior Court No. 1

Hon. E. Spencer Walton, Judge

No. 18735

Come the parties by their attorneys, and the Court being sufficiently advised in the premises, gives its opinion and judgment as follows, pronounced by Royse, C. J. Pfaff, P. J., not participating.

(Appendix)

The facts which give rise to this litigation may be summarized as follows: Richard H. Tohulka was a member of the Armed Forces of the United States. On November 15, 1941 he took out a $1300.00 life insurance policy under the "National Service Life Insurance Act of 1940." In that policy he named his brother, appellee George Edward Tohulka, principal beneficiary, and his sister, appellant Helen Augusta Voelkel, contingent beneficiary. On January 2, 1943, while on a furlough to his home in South Bend, Indiana, he executed his last will and testament. Item III of that will provided as follows:

> "All the rest and residue of my property, real, personal and mixed, and wherever situated, including any and all life insurance, I give, devise and bequeath to my surviving brothers and sisters, excluding the above Randall Tohulka, to them and to their heirs forever, in equal shares. If any of said brothers or sisters predecease me, leaving lawful issue surviving them, then the share given said deceased brother or sister, in this residuary clause, shall pass to said lawful issue, per stirpes.
>
> "All of my life insurance, meaning proceeds of any policies upon my life, and including United States Government insurance, shall be paid to those entitled to my residuary estate, under this item of my will, all provisions of beneficiary clauses in said policy or policies to the contrary, notwithstanding."

On January 22, 1943, after he returned to military camp, he applied for and was granted additional insurance in the sum of $8500.00 and at the same time he changed the beneficiaries for the original insurance and made appellant Voelkel principal beneficiary and appellant Edna E. Pratt contingent beneficiary for all such insurance in the sum of $10,000.00. He was killed in action

April 22, 1945. The United States, through the Veterans Administration, paid appellant Helen A. Voelkel all payments due under said insurance policies.

Appellees brought this action against appellants. Their complaint was in three paragraphs. After averring the facts set out above it averred it was the intention, wish and desire of decedent that the proceeds of said insurance should be received by appellant Voelkel as trustee, and be divided equally between the parties hereto; that she has refused to make such distribution. It concluded with prayer that she be removed as such trustee, a successor trustee appointed; that she be required to make an accounting of monies received from such insurance, and that the proceeds be divided equally between the parties. There were answers of admission and denial under the rules. Trial to the court resulted in finding and judgment in favor of appellees.

The error assigned here is the overruling of appellants' motion for a new trial. The specifications of that motion are; The decision is not sustained by sufficient evidence and is contrary to law.

Because substantially the same questions are raised by the two causes for a new trial, appellants have grouped them together for the argument presented in their briefs.

In addition to the facts above set out, the record discloses that at the time decedent made his will appellant Voelkel and some of the appellees met in the office of one William Bertsch, the attorney who prepared the will, and there decedent told them he wanted all his insurance, including the government insurance, divided equally between the parties to this litigation. It is to be kept in mind that

at that time decedent had a policy for only $1500.00 and that appellee George Tohulka was named therein as principal beneficiary and appellant Voelkel as contingent beneficiary. There is not a scintil[illegible] of evidence in the record that from the time decedent increased the insurance and changed the beneficiary to appellant Voelkel as principal beneficiary and appellant Pratt as contingent beneficiary he ever indicated to her or any one else that he desired or wanted her to divide the proceeds of this insurance. It is further disclosed by the record that appellant Voelkel did not know a change had been made as to the beneficiary until after the death of her soldier brother. She was informed by attorney Bertsch, who drew the will and was her attorney as executor of her brother's estate, that the government insurance was not a part of that estate. There is some controverted evidence that appellant Voelkel, in family gatherings after the death, was asked when she was going to divide the insurance, and said she would do so after the body of the deceased was returned or when there was a settlement among the parties of the real estate of their deceased parents.

It is conceded by the parties that the right of the deceased veteran to apply for, receive and be granted the insurance in question is given, defined and controlled by an Act of Congress cited as "National Service Life Insurance Act of 1940", being Title 38 U.S.C.A., Sections 801-808, and by the regulations authorized to be made and promulgated thereunder. Likewise, the right to receive, have and dispose of the proceeds of such insurance is restricted, controlled and defined by the terms of such Act and by such regulations. Such insurance is not evidenced by a formal policy, but the law and the regulations constitute the contract of insurance.

(Appendix)

The provisions of this Act necessary to a determination of the question presented here may be summarized as follows: Title 38 U.S.C.A., Sec. 802(g) provides that insurance shall be payable only to a widow, widower, child (including a step-child or an illegitimate child if designated as beneficiary by the insured), parent, brother, or sister of the insured. The insured shall have the right to designate the beneficiary or beneficiaries within the classes provided, and shall have the right to change the beneficiary or beneficiaries without the consent of such beneficiary or beneficiaries. Subsection (h) (1) of the same section provides that if the beneficiary to whom payment is first made is under thirty years of age, the insurance shall be paid in two hundred and forty equal monthly installments; (2) that if such beneficiary is thirty or more years of age at the time of maturity, in equal monthly installments for one hundred and twenty months certain, with such payments continuing during the remaining lifetime of such beneficiary. Subsection (i) provides that the right of any beneficiary to payment of any installments shall be conditioned upon his or her being alive to receive such payments. And, further, that no person shall have a vested right to any installment or installments of any such insurance, and any installments not paid to a beneficiary during such beneficiary's lifetime shall be paid to the beneficiary or beneficiaries within the permitted class next entitled to priority as provided in Subsection (h). Subsection (j) provides no installments shall be paid to the heirs or legal representatives as such of the insured or of any beneficiary. And in the event no person within the permitted class survives to receive the insurance or any part thereof, no payment of the unpaid installments shall

be made. Section 454a provides benefits due or to become due shall not be assignable or be subject to taxation and shall be exempt from claims of creditors, not liable to attachment, levy or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary.(1)

Appellant contends the effect of the judgment was to "seize" the installments matured and paid as well as the future installments when they became due and payable. It was adjudged that such future payments be received by a trustee and distributed and divided as ordered and directed. In such two respects the judgment was in conflict with and contrary to said Sec. 454a and Sec. 802(j), and consequently is contrary to law. For the reasons hereinafter stated, we agree with these contentions.

"The validity and construction of National Service Life Insurance policies present questions of federal law". American Law of Veterans, (Second Edition), §420, p. 302.

In the case of *Wissner et al* v. *Wissner* (1950), 338 U.S. 655, 70 U.S. Sup. Ct. Rep. 398, 94 Law Ed. 424, the facts may be summarized as follows: Major Leonard O. Wissner enlisted in the Army in 1942. In 1943 he obtained a National Service Life Insurance policy in the sum of $10,000.00. He and his wife were estranged at the time he entered the Army. Without the knowledge or consent of his wife he named his mother principal and his father

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(1) Regulation 10.3446: "An original beneficiary designation may be made by last will and testament duly probated, but no change of beneficiary may be made by last will and testament."

contingent beneficiary. He died in service in India in 1945. The government was paying his mother the proceeds of the policy in monthly installments. Subsequently, the widow brought an action against the parents in the Superior Court of California alleging that under the community property law of that State she was entitled to one-half of the proceeds of the policy. The California Court found the Major's Army pay was community property and was the source of the premiums paid on the policy. Judgment was entered in favor of the widow for one-half of the amount already received and requiring the parents to pay one-half of all future payments immediately upon the receipt thereof. The judgment was affirmed by the California District Court of Appeals and the California Supreme Court denied a hearing. In reversing the California judgment the Supreme Court of the United States said:

> "The controlling section of the Act provides that the insured 'shall have the right to designate the beneficiary or beneficiaries of the insurance (within a designated class), • • • and shall • • • at all times have the right to change the beneficiary or beneficiaries • • • ' 38 U.S.C. §802(g). *Thus Congress has spoken with force and clarity in directing that the proceeds belong to the named beneficiary and no other.* Pursuant to the congressional command, the Government contracted to pay the insurance to the insured's choice. He chose his mother. It is plain to us that the judgment of the lower court, as to one-half of the proceeds, substitutes the widow for the mother, who was the beneficiary Congress directed shall receive the insurance money. We do not share appellee's discovery of congressional purpose that widows in community property states participate in the payments under the policy, contrary to the express

direction of the insured. Whether directed at the very money received from the government or an equivalent amount, the judgment below nullifies the soldier's choice and frustrates the deliberate purpose of Congress. It cannot stand.

"The judgment under review has a further deficiency so far as it ordered the diversion of future payments as soon as they are paid by the Government to the mother. At least in this respect, the very payments received under the policy are to be 'seized', in effect, by the judgment below. This is in flat conflict with the exemption provision contained in 38 U.S.A. §454a, made a part of this Act by 38 U.S.C. §816: Payments to the named beneficiary 'shall be exempt from the claims of creditors, *and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever*, either before or after receipt by the beneficiary * * * '" (Our emphasis).

In the case of *United States* v. *Henning* (1952), 344 U.S. 56, 73 Sup. Ct. Rep. 114, 97 Law Ed. 101, the Supreme Court of the United States reviewed the government insurance acts and amendments thereto commencing with the 1917 Act to and including the Act of 1946. It approved the holding in the *Wissner* case, *supra*, and reversed the judgment of the District Court for the payment of accrued installments to the estates of deceased beneficiaries under the policy.

As to change of beneficiary of such policies, see Ann. 2 A.L.R. (2d) 490-508.

In our opinion the foregoing authorities announce the rules by which we must determine the question presented here.

(Appendix)

It seems clear to us on the record in this case that the provisions of Item III of the deceased soldier's will cannot affect the disposition of the government insurance involved herein.

Because of statutory provisions against an assignment of the proceeds of such insurance, it is very doubtful if an agreement between a named beneficiary and others to share the proceeds of such insurance would be enforceable. American Law of Veterans, *supra*, p. 351, 352. Certainly there is no evidence of any such valid agreement in this case. It seems to us that the conversations between the parties after the death of decedent could, at most, be regarded only as nudum pactum (promise without consideration), and hence were unenforceable.

In our opinion, under the Act of Congress as construed by the Supreme Court of the United States, providing for the insurance which is the subject of this action, appellant Voelkel is entitled to the proceeds of said insurance.

The judgment of the St. Joseph Superior Court Room 1 is reversed, with instructions to enter judgment for said appellant.

PFAFF, P. J.—Not participating.

APPENDIX "B".

In the Appellate Court of Indiana—In Banc

Helen Augusta Voelkel,
Edna Elizabeth Pratt,
Appellants,
vs.
George E. Tohulka,
Clarence A. Tohulka,
Kenneth D. Tohulka,
Marguerite A. Hay,
Appellees.
No. 18735

Appeal from St. Joseph Superior Court No. 1
Hon. E. Spencer Walton, Judge

Maurice M. Tulchinsky,
701 Odd Fellows Bldg.,
South Bend, Indiana
George Sands,
617-619 Odd Fellows Bldg.,
South Bend, Indiana
Attorneys for Appellants
Hammerschmidt & Johnson
J.M.S. Building
South Bend, Indiana
Attorneys for Appellees

ROYSE, C. J.

The facts which give rise to this litigation may be summarized as follows: Richard H. Tohulka was a member of the Armed Forces of the United States. On November 15,

1941 he took out a $1500.00 life insurance policy under the "National Service Life Insurance Act of 1940." In that policy he named his brother, appellee George Edward Tohulka, principal beneficiary, and his sister, appellant Helen Augusta Voelkel, contingent beneficiary. On January 2, 1943, while on a furlough to his home in South Bend, Indiana, he executed his last will and testament. Item III of that will provided as follows:

> "All the rest and residue of my property, real, personal and mixed, and wherever situated, including any and all life insurance, I give, devise and bequeath to my surviving brothers and sisters, excluding the above Randall Tohulka, to them and to their heirs forever, in equal shares. If any of said brothers or sisters predecease me leaving lawful issue surviving them, then the share given said deceased brother or sister, in this residuary clause, shall pass to said lawful issue, per stirpes.
>
> "All of my life insurance, meaning proceeds of any policies upon my life, and including United States Government insurance, shall be paid to those entitled to my residuary estate, under this item of my will, all provisions of beneficiary clauses in said policy or policies to the contrary, notwithstanding."

On January 22, 1943, after he returned to military camp, he applied for and was granted additional insurance in the sum of $8500.00 and at the same time he changed the beneficiaries for the original insurance and made appellant Voelkel principal beneficiary and appellant Edna E. Pratt contingent beneficiary for all such insurance in the sum of $10,000.00. He was killed in action April 22, 1945. The United States, through the Veterans Administration, paid appellant Helen A. Voelkel all payments due under said insurance policies.

(Appendix)

Appellees brought this action against appellants. Their complaint was in three paragraphs. After averring the facts set out above it averred it was the intention, wish and desire of decedent that the proceeds of said insurance should be received by appellant Voelkel as trustee, and be divided equally between the parties hereto; that she has refused to make such distribution. It concluded with prayer that she be removed as such trustee, a successor trustee appointed; that she be required to make an accounting of monies received from such insurance, and that the proceeds be divided equally between the parties. There were answers of admission and denial under the rules. Trial to the court resulted in finding and judgment in favor of appellees.

The error assigned here is the overruling of appellants' motion for a new trial. The specifications of that motion are: The decision is not sustained by sufficient evidence and is contrary to law.

Because substantially the same questions are raised by the two causes for a new trial, appellants have grouped them together for the argument presented in their briefs.

In addition to the facts above set out, the record discloses that at the time decedent made his will appellant Voelkel and some of the appellees met in the office of one William Bertsch, the attorney who prepared the will, and there decedent told them he wanted all his insurance, including the government insurance, divided equally between the parties to this litigation. It is to be kept in mind that at that time decedent had a policy for only $1500.00 and that appellee George Tohulka was named therein as principal beneficiary and appellant Voelkel as contingent

beneficiary. There is not a scintilla of evidence in the record that from the time decedent increased the insurance and changed the beneficiary to appellant Voelkel as principal beneficiary and appellant Pratt as contingent beneficiary he ever indicated to her or any one else that he desired or wanted her to divide the proceeds of this insurance. It is further disclosed by the record that appellant Voelkel did not know a change had been made as to the beneficiary until after the death of her soldier brother. She was informed by attorney Bertsch, who drew the will and was her attorney as executor of her brother's estate, that the government insurance was not a part of that estate. There is some controverted evidence that appellant Voelkel, in family gatherings after the death, was asked when she was going to divide the insurance, and said she would do so after the body of deceased was returned or when there was a settlement among the parties of the real estate of their deceased parents.

It is conceded by the parties that the right of the deceased veteran to apply for, receive and be granted the insurance in question is given, defined and controlled by an Act of Congress cited as "National Service Life Insurance Act of 1940", being Title 38—U.S.C.A., Sections 801-808, and by the regulations authorized to be made and promulgated thereunder. Likewise, the right to receive, have and dispose of the proceeds of such insurance is restricted, controlled and defined by the terms of such Act and by such regulations. Such insurance is not evidenced by a formal policy, but the law and the regulations constitute the contract of insurance.

The provisions of this Act necessary to a determination of the question presented here may be summarized as

follows: Title 38—U.S.C.A., Sec. 802(g) provides that insurance shall be payable only to a widow, widower, child (including a step-child or an illegitimate child if designated as beneficiary by the insured), parent, brother, or sister of the insured. The insured shall have the right to designate the beneficiary or beneficiaries within the classes provided, and shall have the right to change the beneficiary or beneficiaries without the consent of such beneficiary or beneficiaries. Subsection (h) (1) of the same section provides that if the beneficiary to whom payment is first made is under thirty years of age, the insurance shall be paid in two hundred and forty equal monthly installments; (2) that if such beneficiary is thirty or more years of age at the time of maturity, in equal monthly installments for one hundred and twenty months certain, with such payments continuing during the remaining lifetime of such beneficiary. Subsection (i) provides that the right of any beneficiary to payment of any installments shall be conditioned upon his or her being alive to receive such payments. And, further, that no person shall have a vested right to any installment or installments of any such insurance, and any installments not paid to a beneficiary during such beneficiary's lifetime shall be paid to the beneficiary or beneficiaries within the permitted class next entitled to priority as provided in Subsection (h). Subsection (j) provides no installments shall be paid to the heirs or legal representatives as such of the insured or of any beneficiary. And in the event no person within the permitted class survives to receive the insurance or any part thereof, no payment of the unpaid installments shall be made. Section 454a provides benefits due or to become due shall not be assignable or be subject to taxation and shall be exempt from claims of creditors, not

liable to attachment, levy or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary.(1)

Appellant contends the effect of the judgment was to "seize" the installments matured and paid as well as the future installments when they became due and payable. It was adjudged that such future payments be received by a trustee and distributed and divided as ordered and directed. In such two respects the judgment was in conflict with and contrary to said Sec. 454a and Sec. 802(j), and consequently is contrary to law. For the reasons hereinafter stated, we agree with these contentions.

"The validity and construction of National Service Life Insurance policies present questions of federal law". American Law of Veterans (Second Edition), §420, p. 302.

In the case of *Wissner et al* v. *Wissner* (1950), 338 U.S. 655, 70 U.S. Sup. Ct. Rep. 398, 94 Law Ed. 424, the facts may be summarized as follows: Major Leonard O. Wissner enlisted in the Army in 1942. In 1943 he obtained a National Service Life Insurance policy in the sum of $10,000.00. He and his wife were estranged at the time he entered the Army. Without the knowledge or consent of his wife he named his mother principal and his father contingent beneficiary. He died in service in India in 1945. The government was paying his mother the proceeds of the policy in monthly installments. Subsequently, the widow brought an action against the parents in the Su-

---

(1) Regulation 10.3446: "An original beneficiary designation may be made by last will and testament duly probated, but no change of beneficiary may be made by last will and testament."

perior Court of California alleging that under the community property law of that State she was entitled to one-half of the proceeds of the policy. The California Court found the Major's Army pay was community property and was the source of the premiums paid on the policy. Judgment was entered in favor of the widow for one-half of the amount already received and requiring the parents to pay one-half of all future payments immediately upon the receipt thereof. The judgment was affirmed by the California District Court of Appeals and the California Supreme Court denied a hearing. In reversing the California judgment the Supreme Court of the United States said:

> "The controlling section of the Act provides that the insured 'shall have the right to designate the beneficiary or beneficiaries of the insurance [within a designated class], • • • and shall • • • at all times have the right to change the beneficiary or beneficiaries • • • .' 38 U.S.C. §802(g). *Thus Congress has spoken with force and clarity in directing that the proceeds belong to the named beneficiary and no other.* Pursuant to the congressional command, the Government contracted to pay the insurance to the insured's choice. He chose his mother. It is plain to us that the judgment of the lower court, as to one-half of the proceeds, substitutes the widow for the mother, who was the beneficiary Congress directed shall receive the insurance money. We do not share appellee's discovery of congressional purpose that widows in community property states participate in the payments under the policy, contrary to the express direction of the insured. Whether directed at the very money received from the government or an equivalent amount, the judgment below nullifies the soldier's choice and frustrates the deliberate purpose of Congress. It cannot stand.

"The judgment under review has a further deficiency so far as it ordered the diversion of future payments as soon as they are paid by the Government to the mother. At least in this respect, the very payments received under the policy are to be 'seized', in effect, by the judgment below. This is in flat conflict with the exemption provision contained in 38 U.S.A. §454a, made a part of this Act by 38 U.S.C. §816: Payments to the named beneficiary 'shall be exempt from the claims of creditors, *and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever,* either before or after receipt by the beneficiary * * * '" (Our emphasis).

In the case of *United States* v. *Henning* (1952), 344 U.S. 56, 73 Sup. Ct. Rep. 114, 97 Law Ed. 101, the Supreme Court of the United States reviewed the government insurance acts and amendments thereto commencing with the 1917 Act to and including the Act of 1946. It approved the holding in the *Wissner* case, *supra,* and reversed the judgment of the District Court for the payment of accrued installments to the estates of deceased beneficiaries under the policy.

As to change of beneficiary of such policies, see Ann. 2 A.L.R. (2d) 490-508.

In our opinion the foregoing authorities announce the rules by which we must determine the question presented here.

It seems clear to us on the record in this case that the provisions of Item III of the deceased soldier's will cannot affect the disposition of the government insurance involved herein.

Because of statutory provisions against an assignment of the proceeds of such insurance, it is very doubtful if an agreement between a named beneficiary and others to share the proceeds of such insurance would be enforceable. American Law of Veterans, *supra*, p. 351, 352. Certainly there is no evidence of any such valid agreement in this case. It seems to us that the conversations between the parties after the death of decedent could, at most, be regarded only as nudum pactum (promise without consideration), and hence were unenforceable.

In our opinion, under the Act of Congress as construed by the Supreme Court of the United States, providing for the insurance which is the subject of this action, appellant Voelkel is entitled to the proceeds of said insurance.

The judgment of the St. Joseph Superior Court Room 1 is reversed, with instructions to enter judgment for said appellant.

PFAFF, P. J.—Not participating.

(Appendix)

And now the plaintiffs move to withdraw motion for Special Findings of Fact and Conclusions of law, which motion the Court grants and Motion is withdrawn with the consent of the defendants.

And now the Court takes this cause under advisement and orders that Briefs be filed by both parties by Tuesday, January 18, 1955.

And afterwards, to-wit: On the 21st day of January, 1955, the same being the 59th Judicial Day of the November, 1954 Term of said Court, before the Honorable Judge aforesaid, the following further proceedings were had in the above entitled cause, to-wit:

Come now the parties herein, and now plaintiff files additional Brief (HI) Defendant also files Reply to Brief (HI) and now arguments are heard.

And now the Court takes decision under advisement.

APPENDIX "C".

And afterwards, to-wit: on the 23rd day of February, 1955, the same being the 9th Judicial Day of the February 1955 Term of said Court, before the Honorable Judge aforesaid, the following further proceedings were had in the above entitled cause, to-wit:

Come now the parties herein and the court having taken this decision under advisement, now finds for the plaintiffs and against the defendant Helen Augusta Voelkel as follows, to-wit:

DECREE

Comes now the above enumerated parties, the plaintiffs by their counsel, Louis M. Hammerschmidt, of the firm of Hammerschmidt & Johnson, and the defendants by their counsel, George Sands and Maurice M. Tulchinsky.

This cause in equity for the enforcement of a trust being at issue, is submitted to the Court for trial, and the Court having heard the evidence, the argument of counsel and being duly advised in the premises, finds for the plaintiffs, that the allegations of their complaint in three paragraphs are true; that the defendant, Helen Augusta Voelkel was, by Richard E. Tohulka, her brother, the deceased soldier, made the beneficiary of his National Life Insurance under two certificates of insurance, one numbered N. 685 697 for $1,500, and the other numbered N8827204 for $8,500, a total of $10,000; that the said

deceased brother and soldier, in the event of his death, orally directed said Helen Augusta Voelkel to distribute the proceeds of said insurance equally to herself and her three brothers, and one sister, the plaintiffs, and to the defendant sister, Edna Elizabeth Pratt, to which request she orally consented and agreed when his said insurance matured by death; that said deceased brother and soldier also made a will wherein he bequeathed all of his government insurance to said brothers and sister, the plaintiffs, and said sisters, the defendants; that said deceased insured brother and testator was killed in action on April 22, 1945, when said insurance matured; that said defendant, Helen Augusta Voelkel, caused said Will to be probated, qualified and was appointed sole Executrix of the estate of Richard H. Tohulka; did administer said estate and was discharged as Executrix, without making, and refused to make distribution of the insurance to her three brothers and two sisters, as the Will provided. That the said insurance in the sum of $10,000 payable monthly in the sum of $47.20 was settled by the United States Government through the Veterans Administration in favor of said Helen Augusta Voelkel as beneficiary, and she has received through the Veterans Administration the following amounts and at the following times, to-wit:

(Appendix)

22 N 685 697		PERIOD			Monthly Rate	AMOUNT
No. of Checks						
5	Payments	4-22-45	through	9-21-45	$ 7.08	$ 35.40
55	"	9-22-45	"	4-21-50	7.08	389.40
2	"	4-22-50	"	6-21-50	7.08	14.16
8	"	6-22-50	"	2-21-51	7.08	56.64
32	"	2-22-51	"	10-21-53	7.08	226.56
3	"	10-22-53	"	1-21-54	7.08	21.24
1	"	1-22-54	"	2-21-54	7.08	7.08
1	"	2-22-54	"	3-21-54	7.08	7.08
8	"	3-22-54	"	11-21-54	7.08	56.64
						$ 814.20
National Service Life Insurance 1948 Special Dividend						33.83
					Total Paid	$ 848.03

Date of last payment October 22, 1954.

22 N. 8 887 204						
5	Payments	4-22-45	through	9-21-45	$40.12	$ 200.60
54	"	9-22-45	"	3-21-50	40.12	2166.48
3	"	3-22-50	"	6-21-50	40.12	120.36
8	"	6-22-50	"	2-21-51	40.12	320.96
32	"	2-22-51	"	10-21-53	40.12	1283.84
3	"	10-22-53	"	1-21-54	40.12	120.36
1	"	1-22-54	"	2-21-54	40.12	40.12
1	"	2-22-54	"	3-21-54	40.12	40.12
8	"	3-22-54	"	11-21-54	40.12	320.96
						$4613.80
National Service Life Insurance 1948 Special Dividend						26.23
					Total Paid	$4640.03

Date of last payment October 22, 1954.

(Appendix)

Since October 22, 1954, said Helen Augusta Voelkel has received monthly payments, in addition to the aforesaid amounts, for November and December, 1954, the sum of $94.40; the total payments received to and including December, 1954, aggregate $5,582.46, all of which settlements she has received wrongfully and unlawfully retained solely to herself, and neglected and deliberately refused to pay any part of said sum to her said three brothers, and two sisters, in deliberate violation of said trust.

That by reason of the violation of said trust by the retention and use of five-sixths of said sum of $5,582.46 by said defendant, Helen Augusta Voelkel, which sum she had and received for use of said plaintiffs and defendant Edna Elizabeth Pratt, as well as herself, she is chargeable with interest on five-sixths of the monthly payments of $47.20 or $39.33 monthly from time of receipt, beginning April 22, 1945, and each month thereafter to February 14, 1955, and with six percent interest on five-sixths of the dividends received and retained in the amount of $60.06 or $50.01 from January 1, 1949 to February 14, 1955, total interest in the sum of $1,362.18.

It is therefore considered, adjudged and decreed by the Court that the defendant, Helen Augusta Voelkel, has received from the Veterans Administration the sum of $5,582.46 from April 22, 1945, to December 22, 1954, in monthly payments of insurance and dividends on the National Life Insurance under Certificate Nos. 85,697 and 8 827 204, in the principal amount of $10,000 and dividends issued to Richard H. Tohulka, the insured, deceased soldier and brother to all of the parties to this action, which insurance matured upon his death on April

22, 1945, which fund, consisting of said monthly payments and dividends she received as Trustee, in trust for the use and purpose of herself, her sisters and her three brothers, all parties to this action; that five-sixths of said fund the said plaintiffs and said defendant, Edna Elizabeth Pratt, are now entitled to; and there is now due and immediately payable to them from the defendant, Helen Augusta Voelkel, trustee and beneficiary, five-sixths of $5,582.46, which is $4,652.05, and in addition, interest on $39.33 at six percent per annum from April 22, 1945, to February 14, 1955, in the sum of $1,346.80 and interest at six percent per annum on five-sixths of $60.06, which is $50.01 dividends received from January 1, 1949, to February 14, 1955, in the sum of $15.38 a total interest of $1,362.18, and a total principal and interest of $6,014.23.

The said defendant, Helen Augusta Voelkel, as trustee and beneficiary, is directed and ordered to immediately pay to each of said plaintiffs the following amounts: To George E. Tohulka, the sum of $1202.84; to Clarence A. Tohulka, the sum of $1202.85; to Kenneth D. Tohulka, the sum of $1202.85; and to Marguerite A. Hay the sum of $1202.85.

It is further considered, adjudged and decreed by the Court that said defendant, Helen Augusta Voelkel, as beneficiary, shall immediately pay one-sixth of the balance of the principal of insurance, including all accruals or dividends to each of plaintiffs as and when received by her from the Veterans Administration, under and as provided in said Certificates of insurance Nos. N 685 697 and N 8 827 204, commencing with the monthly payment of $47.20 in January, 1955, and each and every month thereafter until the balance due under said Certificates has been fully paid and settlement fully completed, which

monthly payments shall be paid to each of the plaintiffs, one-sixth to each as follows:

To George E. Tohulka, $7.87; to Clarence A. Tohulka, $7.87; to Kenneth D. Tohulka, $7.87; and to Marguerite A. Hay, $7.87 and also to each of said plaintiffs, one-sixth of any additional payments made by the Veterans Administration under said Certificates of said insurance on the life of the deceased soldier, Richard H. Tohulka, immediately when received by said defendant, Helen Augusta Voelkel, as beneficiary and Trustee.

It is further considered, adjudged and decreed by the Court that it shall retain jurisdiction of this trustee and trust until said trustee, Helen Augusta Voelkel, has fully performed the trust, by the prompt payment of the said trust funds, with interest, which have been wrongfully and unlawfully withheld by her as hereinbefore set out, and in the prompt payment to each of the said plaintiffs of their one-sixth share of any and all monthly payments to be made to the said trustee and beneficiary by the Veterans Administration in the full settlement of the insurance under and by virtue of said certificates of insurance Nos. N 685 697 and N 8 827 204, issued to said deceased soldier, Richard H. Tohulka; and for this Court to take such steps and make such orders to require and order said Trustee to fully perform this Decree in the event any default, failure or refusal of said Trustee and beneficiary so to do, and any and all further equitable remedies authorized by law to which the plaintiffs may be entitled.

The plaintiffs shall recover any costs in this Action.

Dated at South Bend, Indiana, this 23 day of February, 1955.

E. Spencer Walton,
Judge, St. Joseph Superior Court No. 1.

IN THE

JOHN T. FEY, Clerk

Supreme Court of the United States

TERM A. D. 1957.

No. 517

HELEN AUGUSTA VOELKEL,
EDNA ELIZABETH PRATT,

Petitioners,

vs.

GEORGE E. TOHULKA,
CLARENCE A. TOHULKA,
KENNETH D. TOHULKA,
MARGUERITE A. HAY,

Respondents.

PETITIONERS' REPLY BRIEF.

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IN THE

Supreme Court of the United States

..... TERM A. D. 1957.

No. 517

HELEN AUGUSTA VOELKEL,
EDNA ELIZABETH PRATT,

Petitioners,

vs.

GEORGE E. TOHULKA,
CLARENCE A. TOHULKA,
KENNETH D. TOHULKA,
MARGUERITE A. HAY,

Respondents.

PETITIONERS' REPLY BRIEF.

The following is addressed to the respondents' brief and citations in support of same.

It will be noted that respondents have cited practically the same group of cases which appear in the decision of the Supreme Court of Indiana as Appendix "A" to the Petition for Writ of Certiorari.

I.

With reference to *Burgess* v. *Murray* (1952) 194 F. 2d 573, this case is discussed in the case of *Tohulka* v. *United States*, (1953) 204 F. 2d 414, at p. 416, where the court states as follows:

> "The decision turned upon whether the insured had made a valid change of the beneficiary and the court, having determined that question in the affirmative, rightfully concluded that it could proceed in accord with that change."

Likewise, in *Kaschefsky* v. *Kaschefsky* (1940) 110 F. 2d 836, this case was also explained in the foregoing case of *Tohulka* v. *United States*, at p. 416 of the opinion, where the court held as follows:

> "The court again, having found that there had been an express change of beneficiary, had jurisdiction over all conflicting claims."

So, while the foregoing cases involve a change of beneficiary, respondents, in their own Brief, state, at page 4, with reference to this action, as follows:

> "It is immediately clear no change of beneficiary is involved in this case."

II.

With regard to the other cases cited in respondents' brief, at pages 3 and 4, a study of these cases reveals that they were all decided prior to the National Service Life Insurance Act of 1940. The Supreme Court of Indiana states, in its opinion (6a), as follows:

> "There appears no impediment in the National Service Life Insurance Act of 1940, 38 U.S.C.A., 801, supra, directly opposing the imposition of a trust on funds after they are received by a beneficiary in the interest of a proper disposition of the proceeds in conformity with the wishes of a deceased soldier, if the facts exist which, under other principles of equity, would raise a trust."

The cases cited in support of the foregoing statement are those which, as above explained, arose prior to the Act of 1940. That this is an entirely new system of insurance; and that the proceeds of such a policy are not susceptible to having a trust imposed upon them, we direct attention to Title 38, U.S.C.A., Sec. 802 (i):

III.

> "No person shall have a vested right to any installment, or installments, of any such insurance."

and likewise, we call attention to this provision of the foregoing clause of the Act:

> "Any installments not paid to a beneficiary during such beneficiary's lifetime shall be paid to the beneficiary, or beneficiaries, within the permitted class next entitled to priority."

and likewise, it is provided in Clause (j) of said Title and Section, as follows:

"No installments of such insurance shall be paid to the heirs or legal representatives as such of the insured or of any beneficiaries."

The trial court has ordered the payments received by the designated beneficiary to be divided among her brothers and sisters. We made the observation in our original brief that if any of such other brothers and sisters should die, under the terms of the trial court's decision, which was sustained by the Supreme Court of Indiana, the heirs of such other brothers and sisters would take their share under a so called trust. Respondents have not attempted to answer this argument in their brief, because such a result would be completely contrary to the intent and purposes of the National Service Life Insurance Act.

The foregoing provisions are peculiarly true with reference to this Act and not the acts under which previous decisions cited by respondents was reached.

IV.

While respondents have argued that these provisions are solely for the benefit of the Government acting through the Veterans Administration, we feel that the real party attempted to be protected was the soldier, in that the beneficiary he designated cannot be changed, directly or indirectly, by parol evidence. The fact that the Government has specified groups and classes of beneficiaries certainly shows the purpose of the Act to be for the protection of veterans and their relatives within such groups.

In support of this, we cite the case of *Heifner* v. *Soderstrom* (1955) 134 F. Suppl. 174, which involved a dispute between the surviving wife and mother of a deceased veteran who held National Service Life Insurance and had at first designated his mother, then his wife, and, following estrangement with the wife, again changed the beneficiary to the mother. The parties being residents of different states, there was a diversity of citizenship and the Federal District Court recognized jurisdiction. Holding that what might be considered an implied agreement, from the fact that the wife had paid part of the premiums, to the effect that the beneficiary would not be changed, that no agreement on the part of the veteran would be effective, if made, to that effect; and holding further, that the decree of the divorce court awarding the wife insurance policies, including the one in question, could not prevail and prevent him from changing the beneficiary.

With reference to the interest which the United States Government might have in an action of this character, the language of the court, in explaining the case of *Wissner* v. *Wissner*, (1950) 338 U.S. 655, 70 S.C.T. 398, 94 L. Ed. 424, which was a decision of this court, the *Heifner* case states, at page 182, as follows:

> "The action of the United States Supreme Court in that case would seem to indicate that that court is of the view that what award a court makes of the proceeds of a National Service Life Insurance policy following their receipt by the designated beneficiary is a matter of Federal Government concern and this even though in the first instance federal district court jurisdiction might be lacking."

V.

In the above case cited, of *Wissner* v. *Wissner*, it is further stated, at 94 L. Ed. 429, as follows:

> "Further, Congress has provided in the National Service Life Insurance Act that the chosen beneficiary of the life insurance policy shall be during life, the sole owner of the proceeds."

If it is the law that the beneficiary under such a policy shall be during lifetime the sole owner of the proceeds, it is difficult to understand how a state court could hold that she holds such proceeds in trust for herself and other persons.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 517

HELEN AUGUSTA VOELKEL, EDNA ELIZABETH PRATT,

Petitioners,

vs.

GEORGE E. TOHULKA, CLARENCE A. TOHULKA, KENNETH D. TOHULKA, MARGUERITE A. HAY,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA.

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

Petitioner has, for the most part, taken her Statement of Facts from the opinion of the Supreme Court of Indiana. Certain facts, however, should be added and certain conclusions in Petitioner's statement that should be corrected.

Petitioner has correctly stated that while her deceased soldier brother was home on leave, she met with him at an attorney's office to draw his Will, and that at that time and place she agreed to divide all of his government insurance among his brothers and sisters. The Will was then drawn and executed. It also stated that all of the deceased soldier's government insurance be divided among his brothers and sisters, except his brother, Randal. At the time the petitioner, Helen Voelkel, agreed to divide the insurance if she were made beneficiary, the deceased sol-

dier only had $1500 of government insurance in existence, and George E. Tohulka, one of the respondents and a brother of the soldier, was beneficiary of that $1500. Upon his return to camp from leave, twenty days after writing his Will, the deceased soldier took out an additional $8,500 of insurance, and made the petitioner, Helen Voelkel, sole beneficiary of the entire amount.

In Paragraph No. 8, Page 15 of Petition for Writ of Certiorari, under Petitioner's heading "Statement," Petitioner states that after the entire amount of insurance came into existence, there is not a scintilla of evidence in the record that the deceased soldier asked her to divide the proceeds of the insurance. Petitioner fails to note, however, that at the time she made her promise, she was beneficiary of no insurance, and hence had no insurance to divide. Immediately upon her soldier brother's return to camp, he took out a total of $10,000 insurance and made her beneficiary. It was clear from these facts to both trial court and Supreme Court of Indiana that this soldier meant this $10,000 insurance when he obtained Petitioner's promise to divide the proceeds among all of his brothers and sisters. The facts set out by Petitioner on Page 14 of her Petition in Paragraph No. 6 of her "Statement" make it clear that she knew her brother wanted all the government insurance divided, and that she was willing and agreed to do so.

The Supreme Court of Indiana held that though the *res* was not in existence when Petitioner made her first promise to divide, "The facts here show that appellant did reaffirm her original promise after she acquired an interest in the proceeds * * * and entered upon the performance of the task of distribution." In accord with Indiana law, these acts created the trust. Also, the Indiana Court recognized the application of a constructive trust because of Petitioner's unjust enrichment.

ARGUMENT.

Questions No. 1 Through 6.

The Petitioner has set out eight questions submitted to this Court on which she predicated the granting of a certiorari, which, for purposes here, we summarize as follows, relating to "Questions Submitted," 1 through 6:

Whether any of the stated sections of the National Service Life Insurance Act of 1940 prevent the raising of a trust in the proceeds of said insurance in the hands of a beneficiary.

The petition, and in particular the argument contained therein, is directed toward the merits of the case, and certainly is not pointed at all to the propositions of what is important about the problem, nor show that the decision probably is not in compliance with the decisions of the United States Supreme Court.

In its decision, the Supreme Court of Indiana applied equitable principles to carry out the clear expressed and affirmative intent of deceased soldier. There are a series of federal and state cases on this and related problems, all of which hold the soldier's intent foremost in its thinking. In most of these cases the courts have applied trusts to carry out the soldier's intent where the facts, as here, warranted the imposition of the trust to carry out the soldier's expressed clear intent. Most of these cases were cited in the decision of the Supreme Court of Indiana, which appears in the Petition under Appendix A, and which we cite here for the convenience of this Court.

Burgess v. *Murray* (1952), 194 F. 2d 131.
Shaull v. *U. S.* (1947), 161 F. 2d 891.

Kaschefsky v. *Kaschefsky* (1940), 110 F. 2d 836.
Ambrose, et al. v. *U. S.* (1926), 15 F. 2d 52.
Christensen v. *Christensen* (1926), 14 F. 2d 475.
Claffy v. *Forbes* (1922), 280 F. 233.
French v. *French* (1946) 161 Kan. 327, 167 P. 2d 305.
Shelly v. *McKimmis, et al.* (1939), 32 Cal. App. 711, 90 P. 2d 842.

There is no dispute among federal or state courts as to the application of equitable principles in cases of this kind. The Petitioner has not cited a single case from any Court which holds that a *trust* cannot be imposed in the proceeds of government insurance. How can it be doubted, in the absence of specific language and prohibition, that Congress *did not* intend to abolish the application of equitable principles to the National Service Life Insurance, principles so deeply rooted in our system of jurisprudence and applied in these matters to carry out the intent and wishes of our servicemen, who gave their lives serving their country.

In attacking the decision of the Supreme Court of Indiana, Petitioner has done nothing more than put forth her argument on the merits of the case, which argument is replete with misapplication of cases and misconstruction of statutes and regulations. Since Petitioner has seen fit to gear her argument to the merits of the case, we feel constrained to briefly answer her contentions.

Petitioner, in her "Argument," page 19, cites regulations relating to change of beneficiary, "A change of beneficiary, to be effective, must be made in writing signed by the assured." It is immediately clear no change of beneficiary is involved in this case. The Petitioner is now and has always been the named beneficiary of her deceased brother's government insurance. She was intended to be

the beneficiary of that insurance. The judgment of the Court does no more than impress a trust on this beneficiary to do what she agreed to do. Petitioner also mentions and cites a regulation relating to the fact that a beneficiary cannot be changed by Will. "No change of beneficiary may be made by last will and testament." This regulation does no more than set out the general law of insurance—that the beneficiary of an insurance policy is not affected by the provisions of a Will. This rule, however, has never prevented the application of a trust against the beneficiary of the proceeds of such insurance. The purpose of these regulations is undoubtedly to protect the government as to whom they would pay the proceeds of the insurance. That the government pays the named beneficiary is clear. That is exactly what the government is doing in this case. The cases cited by petitioner on Page 20 of her Petition are wholly inapplicable here. All three, *Blanchard* v. *U. S.* (1950), 91 F. Supp. 889, *Bradley* v. *U. S.* (1944), 143 F. (2d) 573, *Cohn, et al.* v. *Cohn, et al.* (1948), 171 F. (2d) 828, involve the problem of who was the intended beneficiary—who should the government pay. In none of these cases was the court faced with the situation in which insured imposed a trust on the intended beneficiary to divide among others in the permitted class as here.

Next, Petitioner contends that Title 38, U. S. C. A., Sec. 454A, prevents the application of trusts. It is clear from the reading of this section that Congress intended to prevent creditors from claiming the benefits of the government insurance. The cases of *United States* v. *Henning* (1952), 344 U. S. 66, 73 S. C. 114, 97 L. Ed. 101, and *Wissner* v. *Wissner* (1950), 338 U. S. 655, 70 S. C. 398, 94 L. Ed. 424, are cited by Petitioner as authority for the proposition that Sec. 454A prevents the application of trust. Neither of these cases involves the question of trust. The *Henning* case is so thoroughly inapplicable

that it was not even mentioned in the decision of the Supreme Court of Indiana. The *Henning* case turned on the question of whether or not a beneficiary must live to take the proceeds of government insurance. The *Wissner* case is readily distinguished in the opinion of the Indiana Supreme Court. It does not involve a question of trusts. The decision prevented a widow from claiming one-half the proceeds of her estranged husband's National Service Life Insurance, though she argued under California law one-half of the premium payments were hers, and hence the proceeds were hers. This was held to be in the nature of creditor claim. In the *Wissner* case the deceased soldier's clear intent was that his estranged wife should not receive any of the insurance, but that his mother, the named beneficiary, receive it all. There were no facts which gave rise to the question of trust, as here.

The language of the Indiana Supreme Court makes it clear that the Court has limited the persons who can take beneficiaries of a trust to persons within the permitted class under the Act. The Court said, in its opinion, as set out in the Petitioner's Appendix A, Page 5a—"There is no prohibition against the transfer or assignment of a beneficiary's interest in such insurance to another person, within the permitted class of beneficiaries, such as brothers and sisters, here." The Supreme Court thus recognized that if a trust or similar device were used to attempt to get the proceeds of government insurance to a person outside the permitted class of beneficiaries, the intent of the statute would be contravened. Under the facts of the case now before this high Court, the beneficiaries of the trust are, as the Petitioner herself, brothers and sisters of the deceased soldier, and all of the same permitted class. Thus, Petitioner's discussion on Page 23 of her Petition is wholly without merit as it assumes that the opinion of the Supreme Court of Indiana was so broad to allow the

application of a trust in any case, whether the beneficiaries of that trust were members of the permitted class or not. This, as has been pointed out, is an erroneous assumption. Nor is the government being asked to pay installments of government insurance to the heirs or legal representatives of the insured, or of any beneficiary in violation of Section 802(J). The government is paying all the installments of the government insurance directly to the named beneficiary, the Petitioner herein. The government is not a party to this action. It is being asked to do nothing contrary to the regulations, and the effect of the decision of the Supreme Court of Indiana has been to require Petitioner, the beneficiary of the insurance, to divide the proceeds of this insurance as the deceased soldier intended, and as she agreed to do, among the other brothers and sisters who are members of the permitted class.

Questions No. 7 and 8.

Petitioner's "Questions Submitted" No. 7 and 8 are not discussed in her "Argument," nor does either raise any federal question. Both relate to the substantive law of trusts or procedure of Indiana, and hence are questions to be determined by Indiana courts. Neither is related in any way to any federal statute, United States Constitution or other federal matter. Nor does Petitioner's statement set out any facts which would give rise to either question, both of which are difficult to understand and appear on their face to be without merit.

Conclusion.

The decision of the Supreme Court of Indiana is in line with the existing decisions on this subject throughout the Nation. No decisions are cited by Petitioner which oppose the proposition that trusts can exist in government insurance to carry out the deceased soldier's intent. There are no decisions by the United States Supreme Court opposing or indicating opposition to this proposition. It is probable to assume that this highest Court would never find in Congressional action an intent to destroy the established application of equitable principles in matters of this kind, unless such intent was expressly set out in the statute. No such expression is shown here. Thus it is probable to believe that the decision of this Court, if Certiorari were to be accepted or were to be granted, would be in accord with the other decisions on this point and with the decision of the Supreme Court of Indiana.

This is not an important question as Petitioner implies. The United States Government is not affected by the decision. The rules and regulations which they have set up pursuant to National Service Life Insurance Act statutes, to pay government insurance, are complied with. The Government pays the designated beneficiary, the Petitioner. As the trust imposed by the Indiana Supreme Court does no more than to require Petitioner to divide the proceeds among other members of the permitted class, under the National Service Life Insurance Act, the policy set out by Congress is not contravened, leaving the express intent of the deceased soldier to be carried out by the Indiana Supreme Court decision. As no important question is raised and as there is no showing that the decision in question is probably contrary to the decision and views

of this Court, Respondents pray that the Petition for Writ of Certiorari be denied.

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